Date: August 22, 1996
Case No.: 95-INA-58

In the Matter of:

WHITEY'S RESTAURANT,
Employer

On Behalf Of:

JOSE D. FLORES,
Alien

Appearance: Samuel G. Kooritzky, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 26, 1993, Whitey's Restaurant ("Employer") filed an application for labor certification to enable Jose D. Flores ("Alien") to fill the position of Kitchen Supervisor at the hourly wage of $13.07 (AF 79-82). The job duties for the position were described on the application as follows:

> Supervises kitchen operations, particularly the cooks as they prepare, season, and cook a variety of dishes, including soups, sauces, salads, meats, vegetables, desserts and other food stuffs. Oversees kitchen cleanup, maintenance of equipment. Orders supplies.

The Employer listed no educational requirements but did require two years of experience in restaurant production shift or kitchen supervisor.

On March 9, 1994, the CO issued a Notice of Findings ("NOF") in which he concluded, *inter alia*, that a number of U.S. workers were rejected for unlawful reasons (AF 69-75). The CO stated that the burden of proof is on the Employer to show that U.S. workers are not able, willing, qualified, or available for this job opportunity. On April 19, 1994, the Employer submitted its rebuttal response (AF 59-68). On July 14, 1994, the CO issued his Final Determination denying labor certification for the Alien named herein on the grounds that the Employer failed to rebut the earlier findings that three applicants were rejected for unlawful reasons (AF 50-54).

On August 16, 1994, the Employer requested judicial review of the denial of labor certification (AF 41-49). On August 17, 1994, the Employer's attorney of record submitted

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[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

another request for judicial review and a brief in support of its application for alien labor certification (AF 1-40).

Discussion

The regulations provide in § 656.21(b)(6) that if U.S. workers have applied for the job opportunity, an employer must document that they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. workers. Therefore, an employer must take steps to ensure that it has rejected U.S. applicants only for lawful, job-related reasons. The employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 87-INA-161 (Dec. 7, 1988) (*en banc*).

In his NOF, the CO advised the Employer that the explanation it provided for rejecting three applicants was insufficient to meet its obligation under § 656.21(b)(6).

In the case of applicant Guillermo Gomez, the Employer stated that it rejected applicant Gomez subsequent to an interview, because he did not have enough experience. In the NOF, the CO stated that the Employer failed to provide sufficient information explaining why he was rejected and further failed to submit a copy of Mr. Gomez' resume or completed job application. The CO also stated that he had received documentation from the applicant stating that he made numerous telephone calls trying to reach the restaurant manager but his calls were never returned and he was not interviewed (AF 73-75). The CO stated that Mr. Gomez also stated that he had submitted a resume and completed an application. In the NOF, the CO instructed the Employer to explain the discrepancy in the information provided in its results of recruitment and the information submitted by Mr. Gomez. In rebuttal, the Employer stated that Mr. Gomez did not leave his resume, but only left an application. The Employer further stated that Mr. Gomez was told "that his experience was not exactly what was required, but that he would be called if a decision was made to offer him the position." Lastly, the Employer stated that Mr. Gomez was incorrect in regard to the telephone calls because their records show only two calls from him and these occurred prior to the interview.

In response to the question of whether or not this applicant was interviewed, the Employer states in its brief that "an interview took place in the form of a brief screening performed by the staff member who gave [the applicant] the application." At the same time, it argues that a detailed interview was unnecessary because this applicant was clearly unqualified. The Employer submitted a copy of Mr. Gomez' application which showed that he was employed as an assistant supervisor at Burger Chef between 1968 and 1970, and was also employed for about 17 years of supervisory experience in other operations through 1987. It is unclear from the name of the company where he spent his most recent time as a manager, between 1987 and

1993, whether it was a food-related job.

We conclude, based on a review of this application, the Employer's submissions, and the applicant's submission, that Mr. Gomez was not properly interviewed. The "brief screening" described by the Employer fails to meet the standard of a good-faith effort to interview all potentially qualified candidates. The applicant's resume showed a sufficiently broad range of experience indicating that he may well be very qualified for this management position. Even the Employer did not completely rule out the applicant's qualifying experience when it stated that it "was not exactly what was required, but that he would be called if a decision was made to offer him the position." When an applicant's resume or application indicates that there may be sufficient experience to perform the job duties, an employer bears the burden of further investigation to determine whether the applicant meets all of the requirements. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). To the same effect, see *Hambrecht Terrel International*, 90-INA-358 (Dec. 11, 1991); *Nationwide Baby Shops, Inc.*, 90-INA-286 (Oct. 31, 1991). Thus, the Employer has failed to meet its burden of further investigating this application by rejecting a potentially qualified applicant for unlawful reasons.

The CO's denial of labor certification must, therefore, be AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 1996, for the Panel:

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Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk

Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.